STATE OF WISCONSIN

IN SUPREME COURT

Appeal No. 2019AP001272 - CR

STATE OF WISCONSIN,
Plaintiff-Appellant,

v.

JORDAN ALEXANDER LICKES,
Defendant-Respondent-Petitioner.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT IV, REVERSING AN ORDER OF THE CIRCUIT COURT OF GREEN COUNTY, THE HONORABLE JAMES R. BEER PRESIDING, COMPLETING EXPUNGEMENTS

NONPARTY BRIEF OF LEGAL ACTION OF WISCONSIN, INC.

LEGAL ACTION OF WISCONSIN, INC.
633 West Wisconsin Ave, Suite 2000
Milwaukee WI 53203
Phone: (414) 297-6931
Email: scl@legalaction.org
Susan Lund, SBN: 1087904
Sheila Sullivan, SBN: 1052545
Julie Leary, SBN: 1113385
Jessie Long, SBN: 1104518

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I. INTRODUCTION

Since the 1970's, our legislature has authorized conviction record expungement to help repair the damage caused by criminal convictions. Recent research confirms that expungement is a powerful tool. Amongst other benefits, individuals whose convictions are expunged have higher rates of employment at substantially higher rates of pay.

Unfortunately, a growing body of research reveals that the potential benefits of expungement are being diminished by barriers like complex and/or ambiguous expungement criteria and procedures. These barriers create what scholars call the "uptake gap"—the numerical difference between those who qualify for expungement and those whose cases are actually expunged.

Some important causes of Wisconsin's "uptake gap" are highlighted in this case. In reversing the Court of Appeals' decision to deny Mr. Lickes the expungements ordered by the circuit court, this Court could clarify expungement procedure for thousands of others who are at risk of falling into Wisconsin's expungement uptake gap. Legal Action of Wisconsin ("LAW") thus joins Mr. Lickes in urging the Supreme Court to reject the Court of Appeals' overly expansive reading of the statutory phrase "conditions of probation"—an interpretation which will inevitably result in more contested and unfinished expungements.

LAW further urges the Court to take this opportunity to clarify the decision in *State v. Ozuna* in light of the procedural confusion that has contributed to Wisconsin's "uptake gap." 2017 WI 64, 376 Wis. 2d 1, 898 N.W.2d 20.

II. BACKGROUND

A. *Expungement increases employment and raises wages but few who qualify actually receive it.*

The explosion of mass criminalization has burdened more than 1.4 million people in Wisconsin with criminal records.[1] Nationally, one in three adults has records in the FBI master criminal database and the FBI adds 10-12 thousand new names each day.[2] These records are increasingly detrimental to their subjects due to "advanced technology, a permissive legal framework, and heightened security concerns."[3]

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[1] Joe Peterangelo et al., *A Fresh Start: Wisconsin's Atypical Expungement Law and Options for Reform*, Wis. Pol'y F., at 3, June 2018.

[2] Jeffrey Selbin, Justin McCrary, and Joshua Epstein, *Unmarked? Criminal Record Clearing and Employment Outcomes*, 108 J. Crim. L. & Criminology, 1, 3-4 (2018).

[3] Collen Chien, *America's Paper Prisons: The Second Chance Gap*, 119 Mich. L. Rev. 519, 532-33, 553 (2020); s*ee also* Selbin supra note 2 at 11-14; Becki Goggins, *#1: An Overview of Findings from the 2016 Survey of State Criminal History Records Repository Administrators*, Survey Insights Blog (Spring 2018), http://www.search.org/files/pdf/2016_Survey_Insights_Blog_1.pdf; Soc'y for Hum. Resource Mgmt., *Background Checking—the Use of Criminal Background Checks in Hiring Decisions*, available at https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/pages/criminalbackgroundcheck.aspx; s*ee generally* National Inventory of Collateral Consequences of Conviction, CSG JUST. CTR.,

Collateral consequences of convictions are "disproportionately concentrated by race, gender, and poverty status, especially affecting black men"; as a result, criminal records "may be a significant contributor to racial disparities in employment and other socioeconomic outcomes."[4]

Recognizing the negative impacts of the current criminal records regime, many state legislatures have been expanding access to expungement.[5] Research on the impact of expungement has also increased, with studies showing that expungements improve employment and wage prospects and that "it is highly plausible that expunging criminal records could benefit public safety."[6] Expungements are a great value; they are 50% less expensive than job training while resulting in more than 5 times higher annual earnings increases.[7] Expungement is directly linked to a rise in

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https://niccc.csgjusticecenter.org (documenting 486 consequences codified in Wisconsin law).

[4]J.J. Prescott & Sonja Starr, *Expungement of Criminal Convictions: An Empirical Study*, 133 Harv. L. Rev. 2461, 2471, (2020); The stark racial disparities in Wisconsin's criminal legal system remain an important backdrop for the issues raised in this brief. *See* Brief for Legal Action of Wisconsin as Amici Curiae in Support of Granting Cert, *State v. Lickes*, Appeal No. 2019 AP 1272-CR (2020) at 1-4.

[5] David Schlussel & Margaret Love, *Record-breaking number of new expungement laws enacted in 2019*, Collateral Consequences Resource Center, February 6, 2020, https://ccresourcecenter.org/2020/02/06/new-2019-laws-authorize-expungement-other-record-relief/.

[6] "Ninety-nine percent of those who receive expungements in Michigan are not convicted of a felony . . . in the next five years . . . [i]n fact, expungement recipients appear to be lower risk than the general public." Prescott *supra* note 4 at 2552, *see also* 2528.

[7] Prescott supra note 4 at 2551; *see* Chien *supra* note 3 at 574-575.

employment rates of up to 10% and annual wage increases of $6,000 (nearly 33%) for recipients.[8] Given that nearly half of U.S. children have a parent with a criminal record, the improved employment and wage prospects accompanying expungement will impact more than just the recipient.[9]

Despite this promising data, expungement laws have not had the broad impact many expected. The latest research indicates that this diminished impact may result from a large "uptake gap," which is the numerical difference between those who qualify for expungement and those whose cases are actually expunged.[10]

Uptake gap research reveals that many second-chance provisions are accessed at a rate of less than 10%; after 5 years of eligibility, expungement was accessed at a rate of only 6.5%.[11] A Wisconsin Policy Forum study identified almost 3,000 cases that appeared eligible for expungement in Milwaukee County annually, but less than 100 average annual expungement completions there.[12] These studies suggest that more than 90% of people who might

[8] Selbin *supra* note 2 at 8.

[9] Prescott *supra* note 4 at 2471.

[10] Chien *supra* note 3 at 541-543; Prescott *supra* note 4 at 2477.

[11] Chien *supra* note 3 at 564; Prescott *supra* note 4 at 2552 (only 6.5% of people eligible for expungement in Michigan receive one within five years).

[12] "We found 30,638 . . . Milwaukee County . . . cases between 2006 and 2017 that meet Wisconsin's current eligibility criteria but… only 506 cases were actually expunged … between 2010 and 2016… less than 100 cases per year." Peterangelo *supra* note 1 at 3, 30.

qualify for expungement in Wisconsin and nationwide do not access it.

Researchers identify the primary causes of the uptake gap as confusing expungement criteria, complex procedures, and lack of automation. According to experts, expungement "should be made as simple as possible, or ideally automatic" with a "mechanism that [does] not put the burden of unmarking on the person with a criminal record;" conversely, "untested, unworkable, and at times even unarticulated" criteria cause untenable delay or failure in second-chance programs.[13]

B. *Wisconsin's uptake gap is at least partly caused by court confusion about expungement procedures.*

Unfortunately, Jordan Lickes and others have encountered an unnecessarily confusing and cumbersome expungement process in Wisconsin. The Court of Appeals' decision in this case repeats the mantra that expungement is generally "self-executing." *State v. Lickes*, 2020 WI App 59, ¶ 40, 394 Wis.2d 161, 949 N.W.2d 623, citing *State v. Hemp*, 2014 WI 129, ¶ 27, 359 Wis. 2d 320, 336, 856 N.W.2d 811, 819. But the experience of Mr. Lickes and LAW clients demonstrates that three problems are undermining that key aspect of the statutory scheme and contributing to Wisconsin's uptake gap: 1) courts ordering individuals

[13] Prescott *supra* note 4 at 2553; Selbin *supra* note 2 at 8; Chien *supra* note 3 at 570.

to re-petition for expungement after completing their sentences; 2) DOC failing to forward the Certificate of Discharge; and 3) Courts failing to act after receiving a Certificate of Discharge and Satisfaction of Probation Conditions for Expungement.

First, LAW clients are often required, as Mr. Lickes was, to re-petition for expungement after they complete their sentences.[14] Despite the ruling in *Hemp*, apparently affirmed by *Ozuna*, many trial courts are making re-petitioning a precondition for completing what should be automatic expungement effectuations. LAW Appendix at 1-11.[15] Second, like Mr. Lickes, LAW clients often also experience a substantial delay in DOC compliance with fulfilling the directive to submit the Certificate of Discharge.[16] Finally, courts regularly fail to act after receiving appropriate DOC documentation. To illustrate, a LAW open records request recently revealed 69 cases on CCAP for which DOC submitted a Certificate of Discharge and

[14] Mr. Lickes was sentenced on 1/23/14, before the decision in *Hemp*—which makes his directive to re-petition for expungement less surprising ("upon successful completion of all terms of probation the defendant would be entitled to petition for expungement"). Lickes' Appendix at 67.

[15] 2015 Racine County order: "If … successfully completes probation expungement may be requested"; 2017 Waukesha order: "Defendant must Petition the Court in writing upon successful completion of the sentence"; 2018 Waukesha order: "defendant shall file a petition with the Court to verify the successful completion of the sentence"; 2019 Waushara order: "Upon successful completion of the probation term, Defendant may petition the Court for expungements….." LAW Appendix at 4, 7, 9, 11.

[16] DOC did not submit Mr. Lickes' Certificate of Discharge until 18 months after he completed probation. Lickes' Appendix at 37-39.

Satisfaction of Probation Conditions for Expungement from April-November 2020. LAW Appendix at 12.[17] The online records provide no reason why these expungement orders have not been completed.

III. ARGUMENT

Although the narrow legal issue in this case is whether the phrase "conditions of probation" includes DOC rules of supervision, this Court can simultaneously reject the Court of Appeals' overly expansive reading of Wis. Stat. § 973.015(1m)(b) and clarify the law to reduce procedural confusion and discourage the proliferation of *ad hoc*, post-discharge expungement procedures.

A. *The Court of Appeals misinterpreted Wis. Stat. § 973.015 when it concluded that "conditions of probation" includes DOC rules.*

The Court should adopt the statutory analysis proposed by Mr. Lickes. Lickes' First Brief at 15-22. This interpretation is consistent with long-standing recognition that courts and the DOC have discrete roles in the implementation of punishment and rehabilitation. Only courts, for example, are authorized to confer the privilege of probation. *See State v. Scherr*, 9 Wis. 2d 418, 423-24, 101 N.W.2d 77 (1960); *see also State v. Schwind*, 2019 WI 48, ¶¶ 24-25, 386 Wis. 2d

[17] This was the procedural pitfall in *State v. Hemp*, 2014 WI 129, ¶ 38.

526, 926 N.W.2d 742. The executive branch, through the DOC, has a complimentary, but distinct sphere: it administers probation and manages the day-to-day reintegration of offenders into society. *See State v. Horn*, 226 Wis. 2d 637, 648, 594 N.W.2d 772 (1999).[18]

These distinct roles are "prescribed by statute." *State v. Fearing*, 2000 WI App 229, ¶ 15, 239 Wis. 2d 105, 619 N.W.2d 115, *superseded by statute on other grounds*. Judges both grant the privilege of probation and create the conditional framework on which that privilege depends. *See, e.g.*, Wis. Stat. § 973.09(1)(a). Courts, and only courts, can "extend the period of probation for a stated period or modify the terms and conditions of probation." Wis. Stat. § 973.09(3). Once probation is ordered, a defendant is in "the custody of the DOC and is 'subject . . . to the control of the department *under conditions set by the court and rules and regulations established by the department* for the supervision of probationers, parolees and persons on extended supervision.'" *Fearing*, 2000 WI App 229, ¶ 16 (quoting Wis. Stat. § 973.10(1)) (emphasis added).

Fearing rejected the trial court's attempt to delegate authority to a probation agent to impose, unilaterally, the stayed confinement. *See* 2000 WI App 229, ¶ 18. *Fearing* held that such a delegation was "[i]nconsistent with the detailed delineation of the

[18] At the expungement hearing in this case, the circuit court stressed that DOC was the executive branch of the government with a different role and different tools. Lickes' Appendix at 39-48.

powers of the court and the powers of DOC regarding probation." *Id*. "[C]onditions of probation," the court reasoned, "are a component of the criminal penalty of probation," and have been delegated, in the context of probation, to the courts alone. *Id.* at ¶ 21. The authority "to administer probation," which the DOC retains, and the "authority to impose conditions of probation," must thus remain distinct and separate. *Id.* at ¶ 19.

The text of Wis. Stat. § 973.015 provides no basis for arguing the legislature intended to abolish that distinction in the context of expungement. Like the grant of probation, the discretion to order expungements is delegated by the legislature to the courts, not the DOC. *Ozuna* recognizes that this discretion, exercised in open court, allows the State and the defendant to discuss and contest the terms of expungement orders. 2017 WI 64 at ¶ 5. *Ozuna* suggests this open colloquy confirms the fundamental fairness of the process. *Id.* If the Court of Appeals' decision in this case stands, however, expungement can be denied because of a rule that was never determined by the court to be an appropriate precondition for expungement.

Additionally, the Court of Appeals' incorrect reading of the phrase "conditions of probation" makes the statutory criteria more complicated, increasing the number of facts to review and also increasing potential grounds for failure. Rejecting the Court of Appeals' overly expansive reading of the phrase "conditions of

probation" would have the added benefit of following the uptake gap researchers' admonitions to avoid complicated criteria.

B. *The Court of Appeals' alternate rationale for denying expungement on Counts 1 and 3 cannot be affirmed.*

The Court of Appeals offered a second rationale for denying expungement on Counts 1 and 3—that the expungement order required Mr. Lickes to 'complete' sex offender treatment within the 24 months of supervision on those counts. 2020 WI App 59 at ¶22. This second rationale fails because it is based on a mischaracterization of fact *and* ignores the relevant standard of law.

The Judgement of Conviction for Counts 1 and 3 says only: "Defendant to undergo sex offender treatment and counseling." Lickes' Appendix at 65. There is no explicit requirement either to complete treatment or to do so by the time probation on counts 1 and 3 ended. *Id.* The court's oral direction that Mr. Lickes "successfully complete sex offender treatment…" was, if anything, tied to the three-year term of probation related to Count 4. R 90-4, R 90-6. Nothing in the transcript informs Mr. Lickes he had to complete treatment within the 24-month term of probation rather than the 36-month term. When the oral pronouncement of the sentence is ambiguous, "it is for the trial court to resolve the actual contents of the oral

pronouncement." *State v. Perry*, 136 Wis. 2d 92, 113–14, 401 N.W.2d 748 (1987).

The Court of Appeals confines its explanation of its decision on this point to a single conclusory sentence. *Lickes*, 2020 WI App at ¶ 22. The decision never acknowledges contradictory information in the Judgment of Conviction or sentencing statement and ignores the trial court's reasoning that it did not intend the expungement order to be hyper technical: "the Court has a duty to make sure that justice is performed, not just that every I is dotted and every T is crossed." Lickes' Appendix at 42. Because the Court of Appeals provides no legal basis for ignoring the trial court's interpretation of its own expungement order, its alternate rationale for rejecting expungement for Counts 1 and 3 cannot be affirmed.

C. *Prevailing court confusion paired with concerns raised by "uptake gap" scholarship underscores the need for a Supreme Court opinion that clarifies Wisconsin's expungement procedures.*

This case illustrates the confusion which has taken root in the years since *Ozuna* was decided. The "uptake gap" scholarship demonstrates the profound harm that can result from such confusion. The Court could reduce that confusion by clarifying what *Hemp* and *Ozuna* together actually require from circuit courts in terms of expungement procedure.

First, this Court could clarify that *Ozuna* does not authorize a general post-discharge petition requirement.[19] Instead, *Ozuna* simply acknowledges that a Certificate of Discharge cannot effectuate an expungement not authorized by statute. 2017 WI 64, ¶ 20. *Ozuna* recognizes two situations in which circuit court scrutiny is required to ensure that does not happen: (1) when the DOC record is ambiguous with respect to successful completion of the sentence and (2) when the parties dispute whether a condition of probation was satisfied. *See id* at ¶ 18. *Ozuna* thus creates only a narrow exception to the rule that expungements are automatically effectuated when DOC transmits the Certificate of Discharge to the circuit court. Absent objection raised by a party or by the court *sua sponte*, the expungement order should be completed soon after the DOC paperwork is received.[20]

Second, this Court could clarify that *Ozuna* affirms, albeit obliquely, that circuit courts must provide constitutionally adequate procedures when defendants challenge an assessment that expungement has not been earned. *Ozuna*, 2017 WI 64, ¶ 26, citing *Conn. Dept. of Pub. Safety v. Doe*, 538 U.S. 1, 8, (2003). Mr. Ozuna's failure to challenge the finding

[19] *See supra* section II.B. at 4-5 for examples of courts requiring individuals to re-petition for expungement after completing their sentences; *see also* LAW Appendix at 1-11.

[20] *See supra* section II.B. at 4-5 for examples of courts failing to act after receiving a Certificate of Discharge and Satisfaction of Probation Conditions for Expungement, apparently depriving individuals of earned expungements; see also LAW Appendix at 12.

that he violated a condition of probation was the basis for the Court's limited decision on the due process implications of the case. A defendant who argues they have earned an expungement, by contesting DOC's factual findings or interpretation of the expungement order, has asserted a protected liberty interest and must receive due process. *Matthews v. Eldridge*, 424 U.S. 319, 348–49 (1976).

Those clarifications would eliminate much of the procedural confusion that LAW advocates have observed, in this case and others. Those clarifications would therefore also help reduce Wisconsin's "uptake gap," giving our expungement law a chance to operate as our legislature intended: simply, uniformly, and for the most part, automatically.

IV. CONCLUSION

For the reasons argued here and in Mr. Lickes' first brief, the Court of Appeals decision should be reversed.

Dated this 2nd day of February, 2021.

Signed by:

Susan Lund, SBN: 1087904
Sheila Sullivan, SBN: 1052545
Julie Leary, SBN: 1113385
Jessie Long, SBN 1104518
LEGAL ACTION OF WISCONSIN, INC.
633 West Wisconsin Ave, Suite 2000
Milwaukee, WI 53203
Phone: (414) 297-6931
Email: scl@legalaction.org

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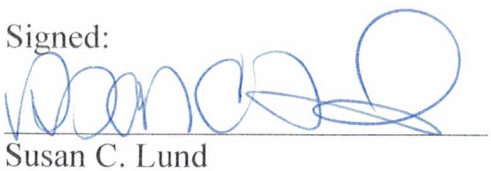

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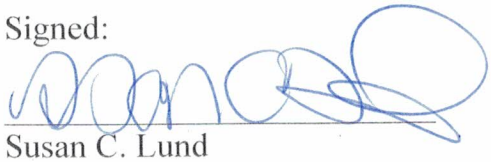

Susan C. Lund

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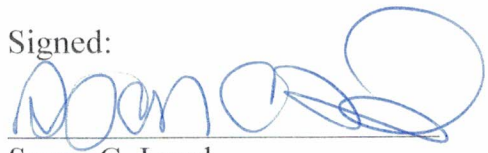

Susan C. Lund